NO. 46885-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRUCE BRATTON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Bratton's custodial admissions following interrogation without adequate Miranda warnings.

2. The state failed to prove beyond a reasonable doubt that Bratton possessed methamphetamine.

Issues Presented on Appeal

1. Where Bratton was in custody, provided Miranda warnings, but later interrogated by two different officers who did not provide Miranda warnings, were his admissions the result of a knowing, voluntary and intelligent waiver of Miranda rights?

2. Did the state prove beyond a reasonable doubt that Bratton possessed methamphetamine, where the Seven Cedars casino staff found a baggie on the floor later determined to contain methamphetamine, and a video depicted something falling from Bratton's pocket, but where no one was able to testify that the baggie of meth was the same item seen falling from Bratton's pocket?

B. STATEMENT OF THE CASE

Dana Keeling a slots supervisor at the Seven Cedars casino discovered a small baggie with a white powdery substance on May 13, 2014. RP 52-53. Keeling contacted security and Michael Stringer came over to the baggie to investigate RP 53-56, 62. Stringer described the baggie as "small" containing "what appeared to be drug paraphernalia". RP 62. Stringer put his foot on the bag and called for a surveillance camera. RP 63. When surveillance was set up, Stringer removed his foot, picked up the

baggie and placed it on a security podium to take a picture. RP 64.

Shortly thereafter, Tribal Gaming Agent Larry Graham came over the to the security podium and took possession of the baggie. RP 64. Graham watched the surveillance video and saw something drop from a person's front pants pocket while that person was seated near slot bank "52". RP 74. Graham could not determine if the baggie found on the ground was the same baggie that the man in the video dropped. RP 74. After the Clallam county police were called, Officer Brett Anglin called Jeffrey Pickrell from Jefferson County to ask for an identification of the man at the video. Pickrell identified the man in the video as Bruce Bratton. RP 85-86.

Bruce Bratton was arrested at his home by officer Mark Apeland of the Jefferson County Police Department. RP 144. Apeland read Bratton his Miranda rights from a card but did not allow Bratton to read his rights, and Apeland never asked if Bratton wished to waive his rights. RP 144-146. Officer Brett Anglin met with Bratton after Apeland arrested him. RP 88. Anglin did not read Bratton his Miranda rights or ask if he was aware of his Miranda rights and wanted to waive those rights. RP 92. Anglin had the ability to obtain a recorded statement or a written statement but chose not to pursue these options. RP 93-95. Instead, Anglin asked Bratton if he dealt methamphetamine. RP 92-93. Anglin stated he did not read Bratton his Miranda rights because he understood that Apeland had previously done so. RP 95.

Jeffrey Pickrell, a Clallam county deputy, arranged to have a Jefferson county police officer drive Bratton to the county line where he

would obtain custody of Bratton. RP 115-16. When Pickrell took custody of Bratton, he did not provide Bratton with Miranda warnings. RP 121. Pickrell had a Miranda advisement card but did not use the card or allow Bratton to review and sign a waiver. RP 122-23. While Bratton was handcuffed in the back of Pickrell's police car, Pickrell engaged Bratton in conversation. RP 123. From memory, based on Bratton's alleged oral statements, Pickrell testified that Bratton told him that the methamphetamine that dropped from his pocket was for personal use. RP 124. Bratton testified that he never made such a statement, that he did not have any methamphetamine in his possession in the casino, but told Pickrell that if he had had any, it would have been for personal use because he used drugs but was not a dealer. RP 177, 184. Sometime later after viewing the video of a white matter inside his pocket, Bratton indicated that the white was not a baggie but rather the liner to his overall pockets. RP 185.

The Washington State lab tested the material in the baggie and determined it contained methamphetamine. RP 156-60. None of the witnesses from the Seven Cedars Casino could identify the baggie found near bank 52 as the same item that dropped from Bratton's pocket. RP 58, 67-68, 74, 82. Pickrell who did not find the baggie or witness the incident, but viewed the video believed he witnessed Bratton drop the found item. RP 101. Based on the video Pickrell did not identify the substance found in the casino and he did not request a finger print analysis to determine if the baggie had Bratton's fingerprints on it. RP 120, 129-30. This timely appeal

follows. CP 9.

2. APPELLANT'S STATEMENTS OBTAINED IN VIOLATION OF MIRANDA SHOULD HAVE BEEN EXCLUDED

a. The police violated Miranda requirements which must be scrupulously honored to protect the constitutional right to be free from self- incrimination.

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V., XIV, Article 1, section 9 of the Washington State Constitution affords the same protection. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). To be admissible, a defendant's statement to law enforcement must pass two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda*[1] test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. *State v. Reuben*, 62 Wn.App. 620, 624, 814 P.2d 1177 (1991).

A confession that is the product of government coercion must be suppressed regardless of whether *Miranda* has been complied with. *United States v. Anderson*, 929 F.2d 96, 98 (2nd Cir. 1991). Courts evaluate the totality of the circumstances to determine whether custodial statements were voluntarily given. *Unga*, 165 Wn.2d at 100 (*citing Fare*

1 *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

v. Michael C., 442 U.S. 707, 724-25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Miranda,* 384 U.S. at 475-77). The government must prove the voluntariness of a defendant's statement by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

Due to the coercive nature of police custody, police officers must advise a suspect of his constitutional rights prior to custodial questioning. *Miranda*, 384 U.S. at 467. Before any officer questioned Bratton he should have been unequivocally advised of his right to remain silent, that anything he said may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one and asked if he understood his rights and wished to waive those rights. *Missouri v. Seibert*, 542 U.S. 600, 611, 124 S. Ct. 2601, 2610, 159 L.Ed. 2d 643 (2004); *Miranda*, 384 U.S. at 479.

Here, the interrogating officer did not provide *Miranda* warnings but instead relied on another officer from a different jurisdiction who indicated that he provided *Miranda* warnings. The *Miranda* warnings have been constitutionally mandated for nearly half a century, but here, the police acted as if once given, it was unnecessary to determine if Bratton wished to waive those rights. A time lapse where a suspect is transported from one location to another location and interviewed by different officers may invalidate previous *Miranda* warnings. *United States v. Smith*, 679 F.Supp. 410, 413 (D. Del. 1988). "[T]he Court

cautions officials not to rely on warnings given by another official at an earlier time. The earlier warnings could be found ineffective or intervening events could invalidate them. Law enforcement officials can quickly and easily reiterate the warnings and avoid these risks." Id.

Pickrell did not advise Bratton of his rights before starting his interrogation and because Apeland only advised Bratton but did not ask him if he wished to waive his rights, that warning was insufficient. "[I]f a suspect in custody does not receive an adequate warning effectively apprising him of his rights before he incriminates himself, his statements may not be admitted as evidence against him." *United States v. Williams*, 435 F.3d 1148, 1152 (9th Cir. 2006) (citing to *Miranda,* 384 U.S. at 479).

Although an individual may knowingly and intelligently waive their constitutional rights and answer questions or provide a statement to the police, "[t]he question whether the accused waived his rights is 'not one of form, but rather of whether the defendant in fact waived the rights delineated in the *Miranda* case.'" *Fare v. Michael C.*, 442 U.S.707, 724, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) (*quoting North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)); "[I]t would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance." *Seibert*, 542 U.S. at 611 (Reversing murder conviction where a deliberate two-step interrogation failed to effectively advise the accused of her right to remain silent.)

"The circumstances surrounding in-custody interrogation can

operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." *Miranda*, 384 U.S. at 469. Suspects must be warned of their right to remain silent and given a meaningful opportunity to exercise it throughout the interrogation. *Miranda*, 384 U.S. at 479.

If an interrogation continues without an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self- incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475.The government must establish that (1) the waiver was voluntary and (2) the defendant understood both the rights he was abandoning and the consequences of a decision to waive those rights. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Fare*, 442 U.S. at 725.

On appeal, the adequacy of a *Miranda* warning and the voluntariness of a suspect's statements are questions of law that are reviewed de novo. *Williams*, 435 F.3d at 1151 (*citing United States v. San Juan-Cruz,* 314 F.3d 384, 387 (9th Cir. 2002); *United States v. Bautista*, 362 F.3d 584, 589 (9th Cir. 2004).

The arresting officer Apeland from Jefferson county was the only officer to read Bratton his *Miranda* warnings but did so after Bratton was arrested and had begun to state he knew why the police came to his house to arrest him. RP 146. Bratton never stated he wanted to waive his rights, he was never given an opportunity to read his rights or to sign a waiver or

to take a moment to understand the implication of speaking without an attorney present. RP 146-148.

Officer Anglin was not present when Apeland offered Miranda warnings and Anglin did not know that Apeland never asked. Bratton if he wished to waive his rights, or if Apeland had given Bratton the opportunity to read and sign a written waiver. RP 91-95. Nonetheless, without offering any additional *Miranda* warnings, Anglin asked Bratton if he was dealing drugs . RP 93.

Officer Pickrell from Clallam County had Jefferson County officers transport Bratton to the county line where Pickrell interrogated Bratton again without providing *Miranda* warnings, even though he carried *Miranda* warning forms on his person, had the ability to record Bratton and to obtain a written waiver. RP 115-16, 121-22.

When an officer interrogates a suspect without giving *Miranda* warnings, and obtains a confession, the initial warnings cannot serve to guarantee a waiver or "function effectively as *Miranda* requires." *Seibert,* 542 U.S. at 611-12. Without a video or voice recording or a written statement it is not possible to determine if Bratton made a knowing, voluntary and intelligent waiver of his rights. Moreover, it is futile to provide *Miranda* by one officer but not the interrogating officer when the two officers did not communicate and neither asked the defendant if he wished to waive his rights. *Seibert,* 542 U.S. at 613-14.

The scenario in this case is similar to the situation in *Seibert* where Justice Souter discussed the futility of a *Miranda*-in-the-middle

advisement:

> A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.

Seibert, 542 U.S. at 613-14.

Apeland never asked Mr. Bratton if he wished to waive his rights and as discussed never gave Bratton the opportunity to consider the implications of discussing matters. *Seibert,* 542 U.S. at 613. Rather after Bratton began to speak, Apeland offered oral Miranda warnings. Under these circumstances, Bratton did not make a knowing waiver of his right to remain silent, because when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to make a knowing, voluntary and intelligent waiver. This is particularly so in this case where two officers failed to offer *Miranda* warnings, and Apeland never gave Bratton the opportunity to read, review and decide to waive his rights. Bratton's statements to the police should have been suppressed

2. THE STATE FAILED TO PROVE BEYOND A REASONBLE DOUBT THE ELEMENT: "POSSESSION" IN THE CHARGE OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE.

The state failed to prove that Bratton possessed a controlled substance, an essential element of unlawful possession of a controlled

substance under RCW 69.50.4013(1).

a. Overview Burden of Proof.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300- 01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitles[s] a criminal defendant to 'a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (*quoting Gaudin*, 515 U.S. at 510).

Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. *Homan*, 181 Wn.2d at 106.

b. RCW 69.50.4013(1) Unlawful Possession of a Controlled Substance.

RCW 69.50.4013 unlawful possession of a controlled substance provides:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1). Accordingly, to prove unlawful possession of a controlled substance, the State must prove "the nature of the substance and the fact of possession." *State v. Bradshaw* , 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (referring to the unlawful possession statute as the "mere possession" statute), *cert. denied,* 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005); *see* RCW 69.50.4013. Possession can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Reichert*, 158 Wn.App. 374, 390, 242 P.3d 44 (2010), *review denied*, 171 Wn.2d 1006, 249 P.3d 183 (2011). Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

c. Insufficient Evidence of Possession.

Graham "observed an individual sitting at a slot machine and what would appear to be a small baggie drop from his left front pants pocket onto the ground." RP 74. Graham did not know if the baggie retrieved and presented at trial was the same baggie he observed dropping from Bratton's pocket. RP 74-76. In fact no one could identify the baggie as having fallen from Bratton's pocket. RP 58, 67-68, 74, 82. Pickrell testified that he saw the found baggie drop from Bratton's pocket, but this was not possible

because Pickrell never identified the baggie or its substance as the same one retrieved from the casino RP 101.

The fact that an unidentified item fell from Bratton's pocket does not establish beyond a reasonable doubt that it was the baggie discovered on the floor containing methamphetamine. The evidence does not establish beyond a reasonable doubt that Bratton possessed methamphetamine. Accordingly, the conviction must be reversed and dismissed with prejudice.

2. THE TRIAL COURT ERRED IN ADMITTING THE STATEMENTS IN VIOLATION OF THE CORPUS DELICTI RULE AND THAT TOO REQUIRES REVERSAL.

The 1.6 grams of methamphetamine at issue here was inside a small plastic baggie located on the floor of the Seven Cedars Casino. A video shows an unidentified item falling from Bratton's pocket, but no witness was able to determine that this was the same baggie full of methamphetamine later located on the floor.

Pickrell testified that Bratton told him that the methamphetamine that dropped from his pocket was for personal use. RP 124. Bratton testified that he never made such a statement, that he did not have any methamphetamine in his possession in the casino, but told Pickrell that if he had had any, it would have been for personal use because he used drugs but was not a dealer. RP 177, 184.

Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession is established when the person charged with possession has dominion and

control over either the drug, *State v. Callahan*, 77 Wn.2d27, 29, 459 P.2d 400 (1969), or the premises. *State v. Davis*, 16 Wn.App. 657, 659, 558 P.2d 263 (1977).

Corpus delicti means the body of the crime and must be proved by evidence sufficient to support the inference that there has been a criminal act. *State v. Brockob*, 159 Wn. 2d 311, 327, 150 P.3d 59, 68 (2006), *as amended (*Jan. 26, 2007*), citing State v. Aten,* 130 Wn. 2d 640, 927 P.2d 210 (1996). A defendant's incriminating statement alone is not sufficient to establish that a crime took place and the State must present other independent evidence to corroborate a defendant's statement. *Brockob*, 159 Wn.2d at 328; *Aten,* 130 Wn.2d at 655-56. "The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement." Id. (Emphasis in the original.)

To determine whether there is sufficient independent evidence under the corpus delicti rule, the evidence is reviewed in the light most favorable to the State. *Brockob*, 159 Wn.2d at 328; *Aten* at 658. However, "[i]f the facts suggest there is an innocent hypothesis for the events, the State's evidence is insufficient to corroborate a defendant's confession." *Brockob*, 159 Wn.2d at 335. *Aten* at 646-47, 660. The defendant in *Aten* confessed to smothering an infant, but because the pathologist who testified about the child's death could not conclude that infant died as a result of human action, the Supreme Court reversed her conviction on corpus delicti grounds.

In *Brockob*, the Supreme Court applied the corpus delicti rule and reversed the defendant's conviction for the crime of unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. *Brockob* had stolen packets of Sudafed and admitted his intent to sell them to someone who was going to manufacture methamphetamine. *Brockob*, 159 Wn.2d at 332. However, outside that admission, there was no other evidence regarding Brockob's intent beyond theft. The court found "the State's evidence was insufficient "to support an inference that he committed the crime with which he was charged." Id. (Emphasis in the original.)

In ruling against the defense motion to exclude Bratton's statements, the trial court simply stated that Bratton made a knowing, voluntary and intelligent decision to waive Miranda rights. RP 34. A defendant's statement is admissible if the State presents evidence that corroborates "not just a crime but the specific crime with which the defendant has been charged." *Brockob*, 159 Wn.2d at 329. (Emphasis in the original.)

Under Washington law, mere proximity, without more, is insufficient to establish constructive possession. *Callahan,* 77 Wn.2d at 29; *State v. Portrey,* 102 Wn.App. 898, 902, 10 P.3d 481 (2000). Setting aside Bratton's statement that if he had possessed methamphetamine it would have been for personal use, the evidence below only indicated that an item fell from Bratton's pocket and a baggie was located on the floor of the casino, perhaps the same baggie, perhaps not. This is not enough to

establish that Bratton or anyone else possessed the exact baggie retrieved and analyzed for methamphetamine.

The analysis of the sufficiency of the corroboration for corpus delicti purposes does not turn on a finding the accused is actually innocent. *Brockob*, 159 Wn.2d at 332. However, there is insufficient corroboration when the evidence is equivocal: "evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either." *State v. Aten*, 79 Wn.App. 79, 91, 900 P.2d 579, 585 (1995) aff'd, 130 Wn.2d 640, 927 P.2d 210 (1996). Like in *Aten*, here the statements should have been excluded. Without the statement, the state would not have had enough to pursue the charges against Bratton. Accordingly, the conviction must be reversed and the case dismissed for insufficient evidence.

3. COUNEL WAS INEEFECTIVE FOR FAILING TO OBJECT TO APPELLANT'S STATEMENTS UNDER THE CORPUS DELECTI RULE.

This Court reviews a claim of ineffective assistance de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). An appellant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness, and ' "a reasonable probability that, but for counsel's deficient performance, the outcome of the [trial] would have been different.'" *State v. Johnson*, 180 Wn.App. 318, 324, 327, P.3d 704 (2014) (internal quotation marks omitted) (*quoting State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011)).

Failure to meet either prong of this test defeats a showing of ineffective assistance of counsel. *Johnson*, 180 Wn.App. at 324. ' "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.' " *State v. Rafay*, 168 Wn.App. 734, 840, 285 P.3d 83 (2012) (internal quotation marks omitted) (*quoting State v. Goldberg*, 123 Wn.App. 848, 852, 99 P.3d 924 (2004)).

This Court takes a deferential view of defense counsel's performance. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) (*citing Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see State v. Olson*, 182 Wn.App. 362, 379, 329 P.3d 121 (2014).

The record does not reveal any tactical or strategic reason why trial counsel would have failed to raise the corpus delecti issue when this issue would have resulted in the dismissal of the charge, particularly where Bratton's counsel argued in closing argument that the only evidence the State had presented with regard to the charge was Bratton's alleged statement that Bratton used drugs but did not deal. RP 221.

The State apparently conceded in closing argument that the evidence on these charges rested on Bratton's alleged statements 'I asked if it was meth they found" and "I told them I used drugs"; He [police] knows I used drugs before"; and "If I did drop a bag there, it would have been for personal use". RP 228. This argument further compounded counsel's error in failing to raise the corpus delecti issue. Here Bratton was prejudiced by his attorney's deficient performance when his counsel failed to move to dismiss the charges

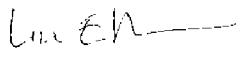
under the corpus delecti rule.

D. CONCLUSION

Bratton respectfully requests this Court reverse his conviction and remand for suppression and dismissal based insufficient evidence, on a violation of *Miranda*, and a violation of the corpus delecti rule- each which would require suppression of Bratton's admissions and leave the state unable to pursue the possession charge.

DATED this 21st day of April 2015.

Respectfully submitted,



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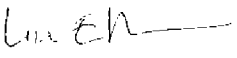

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